SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

Supreme Court, U.S.
FILED
JAN 20 1972
E. ROBERT SEAVER, CLERK

No. 71-804

GABRIEL WOLFF,

Petitioner,

v.

HERBERT F. KORHOLZ, MARTHA KORHOLZ AND THE SUSQUEHANNA CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION AND APPENDIX

CHARLES S. RHYNE
COURTS OULAHAN
ROBERT H. CULP
RHYNE & RHYNE
839 - 17th Street, N.W.
Washington, D.C. 20006

ROBERT O. MANSELL
QUINN, JACOBS, BARRY & FOSTER
135 South LaSalle Street
Chicago, Illinois 60603

Attorneys for Respondents

Washington, D. C. THIEL PRESS 202 393-0625

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

Petitioner failed to print the District Court's Opinion in his Appendix, contrary to Rule 23(1)(i) of this Court. The District Court made extensive findings of fact and conclusions of law which Respondent has included in the Appendix to this brief.

QUESTIONS PRESENTED

Whether this Court should review the decision below where:

1. The District Court found, and the Court of Appeals agreed, that under the facts of this particular case there was no "sale" within the meaning of §16(b) by Korholz when he purchased and transferred the Susquehanna shares to Gypsum.

2. The District Court and the Court of Appeals correctly valued the Gypsum shares owned by Korholz at the market price and held that Korholz realized no profit on this transaction.

3. There is neither an important public issue presented nor a conflict of decisions involved.

STATEMENT OF THE CASE

Prior to December 13, 1965, Respondent, Herbert F. Korholz was President and a member of the Board of Directors and Executive Committee of American Gypsum Co. ("Gypsum"). He and his family as a group owned approximately 56% of the outstanding Gypsum shares.

Early in May, 1965, Korholz learned that a block of Susquehanna stock representing control of that corporation was available from a number of persons known as the "Lannan Group." This was a corporate opportunity for Gypsum which had to be seized without delay since the Lannan Group had other offers and wanted to sell immediately for cash. The First National Bank of Boston, Gypsum's bank, agreed to lend Gypsum $6,450,000 to purchase the Susquehanna shares.

In order that the Bank's loan to Gypsum would have a prior lien on Gypsum's assets, it was necessary for two insurance companies, who were Gypsum's creditors, to give their consent. They did so orally and by telegram, but the Bank's counsel required formal documentation. This could not be completed before the deadline imposed by the

Lannan Group. An arrangement was then worked out with Gypsum, the Bank and Korholz whereby the Bank would make the loan to Korholz personally. Korholz would hold the Susquehanna stock until the documentation was completed and then he would transfer the shares to Gypsum. By resolution, the Gypsum Board of Directors authorized this procedure and agreed to acquire the shares from Korholz. All the Gypsum directors signed the resolution.

Korholz purchased the Susquehanna shares from the Lannan Group on May 25, 1965. He later transferred them to Gypsum at his cost when the documentation was completed. On December 13, 1965, Gypsum and Susquehanna were merged, the shareholders of Gypsum receiving 1 share of Susquehanna common stock for every 1.9 shares of Gypsum. Korholz and his wife exchanged their Gypsum shares for 526,273 shares of Susquehanna.

Petitioner brought this suit under §16(b) alleging that at the time Korholz transferred the Susquehanna shares to Gypsum, he "sold" Susquehanna shares within the meaning of §16(b). Petitioner claimed a §16(b) violation by matching the "purchase" of Susquehanna shares by Korholz at the time of the merger with the "sale" of Susquehanna shares by Korholz to Gypsum.

After seven days of trial, the District Court made extensive findings of fact and conclusions of law. The Court held that Korholz acquired the 430,000 shares of Susquehanna for and on behalf of Gypsum. Since Korholz purchased the shares as a nominee of Gypsum, there was no "sale" within the meaning of §16(b) when he transferred the shares to Gypsum (App. p. 21). Further, the Court held that, even if there were a "sale" of the Susquehanna shares within the meaning of §16(b), Korholz realized no profit on the transactions.

The Court accepted Petitioner's "sale" price of $15.114. In calculating the purchase price of the Susquehanna shares at the time of the merger, the Court looked at the December 13, 1965, market value of the Gypsum shares which Korholz

exchanged for the Susquehanna shares. Since no actual trading in Gypsum shares took place that day, the Court took an average of the highest bid and the lowest asked over-the-counter quotations. This yielded a market value of $6.875 per share.

The unrefuted expert testimony at trial was that shares which represent control of a corporation are worth a premium of 20 to 30% over market value. Since Korholz and his family owned 56.7% of the Gypsum shares, the Court added a minimum premium of 20% to his shares. When this figure was multiplied by the merger exchange ratio of 1.9, the Court computed $15.60 as the fair market value of each share of Susquehanna purchased by Korholz. Thus, even assuming a §16(b) "sale," Korholz could realize no profit because his purchase price was greater than the price at which he transferred the shares to Gypsum (App. p. 19).

The Court of Appeals did not reach the question of whether Korholz had sold the 430,000 Susquehanna shares to Gypsum within the meaning of §16(b). Although the Court clearly expressed its skepticism that the transaction came within §16(b), it nevertheless assumed Petitioner's "truncated" version of the facts, and upheld the District Court's finding that Korholz realized no profit on the transaction.

ARGUMENT

I. THE FACTS OF THIS CASE CLEARLY ESTABLISH THAT NO VIOLATION OF § 16(b) OCCURRED.

At trial, Petitioner failed to establish that a violation of §16(b) had occurred. The undisputed facts clearly showed that Korholz acted as the agent or nominee of Gypsum when he purchased the 430,000 shares of Susquehanna from the Lannan group and that the purchase of these shares was a corporate opportunity for Gypsum which Korholz, as a fiduciary, could not appropriate for himself (App. p. 3).

Therefore, the District Court held that the transfer of these shares by Korholz to Gypsum did not constitute a "sale" within the meaning of §16(b).

The Court of Appeals viewed the facts as a three-step transaction by Korholz, the first two of which were for the benefit of Gypsum. However, the Court did not reach the question of whether there was a "sale" within the meaning of §16(b). It decided the case on the grounds that Korholz realized no profit on the transaction. The Court stated:

> "In addition, we note that plaintiff's entire case is predicated on acceptance of a truncated version of the transaction as including only steps two and three. *As originally intended, and as ultimately consumated, his participation in steps one and two was entirely for the benefit of Gypsum and its stockholders* . . . Nevertheless we accept plaintiff's truncated version of the transaction for purposes of our decision." (Emphasis added) (Petition, pp. 7a-8a).

Further, the Court noted:

> "Indeed, the predicate for plaintiff's entire statutory case is a denial of a continuing fiduciary relationship between June 12 and July 2, 1965." (Petition, p. 8a, fn. 4.)

Thus, the unique facts of this case, as found by the District Court and concurred in by the Court of Appeals, established that no "sale" of the Susquehanna shares was made by Korholz to Gypsum within the meaning of §16(b). This alone is sufficient to warrant the denial of the petition for certiorari.

II. THE VALUATION BY THE DISTRICT COURT AND THE COURT OF APPEALS OF THE GYPSUM SHARES OWNED BY KORHOLZ ON DECEMBER 13, 1965 WAS CORRECT AND IN HARMONY WITH § 16(b) AND COURT DECISIONS INTERPRETING THAT SECTION.

Petitioner does not contest the well-settled proposition that the purchase price of stock under § 16(b) is determined by the value of the "consideration parted with" by the purchaser. *Blau v. Mission Corp.*, 212 F.2d 77, 81 (2d Cir. 1954), *cert. denied*, 347 U.S. 1016; *Park & Tilford, Inc. v. Schulte*, 160 F.2d 984, 988 (2d Cir. 1947), *cert. denied*, 332 U.S. 761; *Stella v. Graham-Paige Motors Corp.*, 259 F.2d 476, 479 (2d Cir. 1958), *cert. denied*, 359 U.S. 914; *Blau v. Lamb*, 242 F. Supp. 151, 160 (S.D. N.Y. 1965), *rev'd on other grounds*, 363 F.2d 507 (2d Cir. 1966), *cert. denied*, 385 U.S. 1002.

Therefore, the purchase price of the Susquehanna shares which Korholz received in exchange for his Gypsum shares pursuant to the Gypsum-Susquehanna merger on December 13, 1965 is determined by the value of his Gypsum stock on December 13, 1965. Both the District Court and the Court of Appeals correctly valued Korholz' Gypsum shares.

1. The Average of the Highest Bid-Lowest Asked Price on the Over-the-Counter Market Accurately Reflected the Market Value of Gypsum Shares on December 13, 1965.

Prior to the merger with Susquehanna, shares of Gypsum were traded in the over-the-counter market. On December 13, 1965, the date of the exchange of Gypsum shares for Susquehanna shares pursuant to the merger, there were no actual trades in Gypsum shares. Therefore, based upon Respondent's uncontested expert testimony at trial, the District Court found that the average of the highest "bid" and lowest "asked" price quoted on December 13 reflected the market value of Gypsum stock. Thus, the Court arrived at market value by averaging the highest price a purchaser

would pay with the lowest price a seller would sell Gypsum shares on this particular day (App. p. 19).

Plaintiff's contention that the lowest bid price must be used is untenable. As the Court of Appeals stated:

> "It [*Smolowe v. Delendo Corp.*, 136 F.2d 231 (2d Cir. 1943)] does not require a court to adopt a completely unrealistic interpretation of the market. In this case the evidence shows that the owners of Gypsum were unwilling to sell for less than $7.125 a share and prospective purchasers were willing to pay $6.75. Clearly a finding that the market value was only $6.00 would be unsupportable." (Petition, p. 10A).

Petitioner has attempted to create a conflict on this point with other Court decisions. No such conflict exists. All of the cases cited by Petitioner involve circumstances in which the Courts had to place a value on the consideration given up by the insider. Each used the actual selling price of the stock on the particular day. *Smolowe v. Delendo Corp., supra*, (Court took the lowest *actual* purchase price and matched it with the highest *actual* sale price); *Marquette Cement Mfg. Co. v. Andreas*, 239 F. Supp. 962 (S.D. N.Y. 1965) (Court took the lowest *actual* sales price on the N.Y. Stock Exchange of Marquette common stock on February 3, 1961); *Heli-Coil Corp. v. Webster*, 222 F. Supp. 831 (D. N.J. 1963), *modified*, 352 F.2d 156 (3rd Cir. 1965) (Court took the *actual* sale price of Heli-Coil debentures in the over-the-counter market to determine the purchase price of the common stock into which the debentures had been converted); *Blau v. Lehman*, 173 F. Supp. 590 (S.D. N.Y. 1959), *aff'd*, 286 F.2d 786 (2d Cir. 1960), *aff'd*, 368 U.S. 403 (Court took the lowest *actual* sale price of Tidewater common on the day of conversion to ascertain the purchase price of the preferred stock); *Blau v. Lamb*, 242 F. Supp. 151 (S.D. N.Y. 1965) (Court took the highest *actual* market price of Air Way common on the date the Air Way preferred stock was converted into the common to determine the "sale" price of the preferred at the time of conversion. On

appeal, the Second Circuit held that the conversion was not a sale within the meaning of §16(b). 363 F.2d 507, 517).

When the Courts speak of "squeezing out" all possible profits under §16(b), this has reference to the Courts' refusal to match particular individual shares which are bought and sold by the insider within 6 months. Instead, the Courts match shares by using the lowest purchase price and the highest sales price. In this way, the insider cannot attempt to minimize his profits on individual shares. *Smolowe v. Delendo Corp., supra.*

However, the "squeezing out" of all profits theory has absolutely no relevance to this case. That theory is based on the prices of actual purchases and sales and does not require the adoption of a purchase price which is not based on market value. In this case, the District Court found, and the Court of Appeals adopted, a realistic market value of Gypsum shares by averaging the highest bid price with the lowest asked price on December 13, 1965. This is in complete harmony with the intent and purpose of §16(b).

2. A 20% Premium Was Properly Added to the Control Bloc of Gypsum Shares Owned by Korholz.

Two well-qualified experts testified at trial that a bloc of shares which represent control of a corporation is worth a 20 to 30% premium over the market price of non-control individual shares. Petitioner did not offer any testimony or other evidence to contradict this expert testimony. Since Korholz and his family owned 56% of the outstanding Gypsum stock, the District Court added a 20% premium to the market value of his shares at the time of the merger.

Petitioner contends that the addition of such a premium will hinder the enforcement of §16(b). This is not the case. The law is clear that the value of the consideration given up for the stock determines the purchase price.

If the insider pays cash for the stock, as is the usual case, there is little difficulty in valuing the consideration given for the stock. However, when the consideration involves shares of another company, as in the instant case, a realistic market value must be placed on those shares. The uncontroverted evidence in this case is that a realistic market value of a control bloc of Gypsum shares was worth a 20% premium above the market price of non-control individual shares.[1] This is perfectly consistent with the intent and purpose of §16(b).

3. Where There Were No Actual Trades of Gypsum Shares on December 13, 1965, the Use of Over-the-Counter Quotations Was Proper To Determine Market Value.

On the day of the merger, December 13, 1965, no shares of Gypsum were actually traded. Therefore, the Court used the next best evidence to establish market value—the bid-asked over-the-counter quotations. Reliance on these quotations was proper, since Gypsum was actively traded, and the quotations listed firm offers to buy and sell by ten brokerage houses or dealers who actively traded in the stock. *Jaffe v. Cruttenden*, 412 Ill. 606, 615-16, 107 N.E.2d 715, 721 (1952); *In re Allender Co.*, 9 S.E.C. 1043, 1057-58 (1941); *In re Charles Hughes & Co.*, 13 S.E.C. 676, 678-79 (1943); Bosland, *Valuation Theories and Decisions of the Securities and Exchange Commission* (1964), p. 87.

Again, Petitioner manufactures a conflict with other decisions where no conflict exists. In *Kramer v. Ayer*, 317 F. Supp. 254 (S.D. N.Y. 1970), the Court, in denying motions for summary judgment, held that actual sales figures on a certain day, if there were any, should be used rather than bid-asked quotations. In *Franklin Nat'l. Bank v. L.B. Meadows & Co.*, 318 F. Supp. 1339 (E.D. N.Y. 1970), a suit under §15 of the Securities Exchange Act by the bank

[1] Korholz in fact received a prior offer of $8 per share for all his Gypsum stock which included a premium above the market price. (App. p. 19).

against four broker-dealers for giving fictitious quotations to the National Quotation Bureau, the Court denied a motion for summary judgment. It held that it was a factual question whether it was reasonable for the bank to rely on the "pink sheet" quotations to value stock held as security for a loan. The Court recognized that the "pink sheets" are widely used. *Id.* at 1345.

4 § 16(b) Requires the Use of Market Values in Determining Purchase Price and Not Merger Appraisal Values.

Petitioner contends that the Court of Appeals should have relied on the merger appraisal values to determine the value of Korholz' Gypsum shares exchanged pursuant to the merger. The Court accurately disposed of this contention:

> "*Plaintiff omits mention of the fact that appraisal values determined for reorganization purposes are not market values.* Susquehanna's $10.75 per share value was the so-called 'break up' value determined by valuing all of Susquehanna's assets and dividing the total by the number of outstanding shares. On the other hand, the $5.65 per share value of Gypsum was the 'going concern' value based upon the experts' analysis of earnings, appropriate capitalization rate and other factors. *These figures were not intended to represent the market price in August, 1965, or at any other time.*" (Emphasis added) (Petition, p. 6a, fn. 3)

Merger appraisal figures are used to evaluate the contribution that each company will make to the surviving company and to establish a fair stock exchange ratio. These figures are not market prices.

In no way does *Stella v. Graham-Paige*, 259 F.2d 476 (2d Cir. 1958) lend support to Petitioner's position. That case involved the valuation of 750,000 shares of Kaiser-Frazer stock which Graham-Paige received in exchange for the sale of all of its assets to Kaiser-Frazer. The Board of

Directors of Kaiser-Frazer had valued the Graham-Paige assets at $4,875,000, which was based upon the net proceeds the Company would receive if it sold the shares at market to the public. The Court held that the Board's valuation should be used to determine the purchase price of the Kaiser-Frazer shares. Since the selling price was lower than the purchase price, defendant Graham-Paige realized no profit under § 16(b).

C. CERTIORARI SHOULD BE DENIED SINCE NO PUBLIC ISSUES OR CONFLICT OF DECISIONS ARE PRESENTED IN THIS CASE.

This Court held in *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393:

> ". . . [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."

This case involves basically a dispute over the particular facts found by the District Court after a week-long trial, with the Court of Appeals affirming the result. Petitioners have failed to show that the case presents important public issues which would warrant this Court's review.

Further, not only is there no "real and embarrassing conflict of opinion and authority between the circuit courts of appeal," there is no conflict whatsoever. The decision of the Court below is entirely consistent with decisions of other circuits which have considered the questions involved.

CONCLUSION

The Petition for Certiorari raises no issue of sufficient importance to justify consideration by this Court, points to no conflict of decisions, and shows no error in the Court below. The Petition should be denied.

Respectfully submitted,

CHARLES S. RHYNE
COURTS OULAHAN
ROBERT H. CULP
RHYNE & RHYNE
839 - 17th Street, N.W.
Washington, D.C. 20006

ROBERT O. MANSELL
QUINN, JACOBS, BARRY & FOSTER
135 South LaSalle Street
Chicago, Illinois 60603

Attorneys for Respondent

January 20, 1972

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PAUL MUELLER and GABRIEL WOLFF, Plaintiffs,	)	
v.	)	NO. 66 C 69
HERBERT F. KORHOLZ, MARTHA KORHOLZ, and THE SUSQUEHANNA CORP., Defendants.	)	

ORDER

The Court having heard the above entitled case after full trial, having considered the contentions of the parties, having adopted Findings of Fact and Conclusions of Law, and having determined that Defendant Korholz in acquiring the 430,000 shares of The Susquehanna Corporation stock acted on behalf of his corporation, American Gypsum Company, that no "sale" and "purchase" within six months by Defendant Korholz of such stock took place within the meaning of Section 16(b) of the Securities Exchange Act of 1934; and that Defendant Korholz did not realize a profit within the meaning of Section 16(b), because the price per share of Susquehanna on December 13, 1965 incident to the merger was as high as the July 2 price; and that Defendant Martha Korholz performed no act which might subject here to liability under Section 16(b), it is hereby

ORDERED that the above-entitled action be and the same is hereby dismissed with prejudice, with costs.

ENTER: /s/ Alexander J. Napoli
UNITED STATES DISTRICT JUDGE

DATED: June 10th, 1969

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This is an action under Section 16(b) of the Securities Exchange Act of 1934. 15 U.S.C. §§ 78a et seq. Plaintiffs claim that on July 2, 1965 Defendant Herbert F. Korholz made a "sale" to American Gypsum Company (Gypsum) within the meaning of Section 16(b) of 430,000 shares of The Susquehanna Corporation (Susquehanna); that on December 13, 1965, less than six months later, Defendant Korholz made a "purchase" of a larger number of Susquehanna shares, incident to the merger between Gypsum and Susquehanna; and that since the "purchase" was at a price lower than the July 2 "sale," Defendant Korholz is liable for the "profit realized."

We find the evidence to be that Korholz, in the transaction leading up to the events of July 2, acted on behalf of Gypsum, of which he was President and a majority stockholder, Korholz discovered a corporate opportunity for Gypsum to acquire the 430,000 shares of Susquehanna. The opportunity had to be seized without delay. However, some delay was required because the First National Bank of Boston (Bank), which financed the transaction, insisted that Gypsum obtain formal consents from two insurance company lenders. William L. Brown, Vice-President of the Bank, arranged to make a 30-day loan to Korholz of $6,450,000 so that he could acquire the stock temporarily and turn it over to Gypsum once the consents had been obtained.

The Gypsum Board of Directors adopted a resolution on May 12, 1965 that Gypsum would take the Susquehanna stock from Korholz at his cost plus expenses. The insurance companies gave oral consents to Brown, and on May 12 and May 14 they confirmed their consents by telegram. The Susquehanna stock was deposited in escrow with the Bank, Korholz delivered his 30-day note to the Bank for $6,450,000, and on May 25, payment was made for the stock.

Thereafter, formal consents were executed by the insurance companies, by aggrements dated June 9, 1965, and under date of July 2, 1965 the Bank switched over the loan to Gypsum.

On August 24th, 1965 Korholz bought 12,500 shares of Susquehanna at $15 per share. In early December, 1965 Susquehanna and Gypsum merged. Papers were filed in New Mexico on December 10th and in Delaware on the 13th. As a result of this merger Korholz received approximately 380,000 shares of Susquehanna and his wife received 140,171 shares.

On the facts, no liability can arise against Korholz under Section 16(b). He acquired and held the stock on behalf of Gypsum, as its agent, and on "purchase" or "sale" by Korholz should be recognized under the statute. See *United States v. A. B. Leach & Co., Inc.*, 84 F.2d 908, 909 (7th Cir. 1936); *Schuh Trading Co. v. Commissioner of Internal Revenue*, 95 F.2d 404, 411 (7th Cir. 1938). The beneficial interest in the Susquehanna stock was not in Korholz but in Gypsum. *Marquette Cement Mgt. Co. v. Andreas*, 239 F. Supp. 962, 967 (S.D.N.Y. 1965).

Plaintiffs point to a Form 3 filed by Korholz with the SEC, dated June 24, 1965, which states that he was the beneficial owner of the Susquehanna stock. However, the filing of such a Form without a disclaimer has little bearing on the question of Section 16(b) liability. *Marquette Cement Mfg. Co. v. Andreas, supra*, 239 F. Supp. at 967; *Chemical Fund, Inc. v. Xerox Corp.*, 337 F.2d 107, 112 (2d Cir. 1967).

The transfer was "involuntary" on the part of Korholz, because he was under a fiduciary duty to transfer the stock to Gypsum. Moreover there was no evidence of insider abuse on short swing speculation on the part of Korholz. *Ferraiolo v. Newman*, 259 F.2d 343, 346 (6th Cir. 1968); *Petteys v. Butler*, 367 F.2d 528, 534, 537 (8th Cir. 1966).

Assuming that a "sale" occurred on July 2, the price on that date as claimed by Plaintiffs is $15.11—the $15 price plus expenses. The price at which Korholz is deemed to have made a "purchase" of Susquehanna stock incident to the merger on December 13, 1965 is the value of the consideration which he parted with to obtain the Susquehanna stock. *Blau v. Mission Corp.*, 212 F.2d 77, 81 (2d Cir. 1954); *Park & Tilford, Inc. v. Schulte*, 160 F.2d 984, 988 (2d Cir. 1947). Defendants' experts have established that since the Gypsum stock which Korholz exchanged in the merger was control stock in Gypsum; the Korholz Gypsum stock was worth a premium of at least 20% more than other Gypsum stock, or a minimum of $8.25 per share. At the 1.9 to 1 merger exchange ratio, each share of Susquehanna stock which Korholz was entitled to receive in the merger was worth at least $15.60. Since this exceeded $15.11, Korholz did not realize any profit within the meaning of Section 16(b).

Defendant Martha Korholz took no part in the 430,000 share transaction except to pledge her stock as collateral, and she has incurred no liability under Section 16(b).

Plaintiffs' secondary claim against Korholz arises from the fact that in May, 1965 Korholz gave one Whitney a "put" for 25,000 shares of Susquehanna stock at $15 per share which Whitney could exercise in August. Plaintiffs' theory, as stated at the close of trial, is that Korholz purchased 25,000 shares from Whitney in August and immediately made a "sale" of 12,500 shares to Samuel Ferguson, his associate. However, prior to the time Whitney exercised the "put," Korholz had made a commitment with Ferguson whereby, if Whitney exercised the "put," Korholz and Ferguson would each take 12,500 shares. When Whitney exercised the "put" Korholz had "firm assurances" to acquire only 12,500 shares, and therefore his "purchase" from Whitney, under Section 16(b), was 12,500 shares, not 25,000 shares. *Blau v. Ogsbury, supra.* Since Korholz purchased and still owns the 12,500 shares there is no purchase and sale within the requirements of Section 16(b). Rule 15(b), F.R.C.P.

Finally, the 12,500 share purchase cannot be matched against the prior 430,000 share transaction, because that transaction was not a "sale" by Korholz within the meaning of Section 16(b).

This cause coming on for trial and having been tried by the Court without a jury and the Court having heard the evidence, considered the arguments and memoranda of counsel for the parties and being fully advised in the premises, finds as follows.

FINDINGS OF FACT

1. Both plaintiff Paul Mueller and Intervening Plaintiff Gabriel Wolff prior to April 1, 1965, and continuously thereafter at all significant times were the record and beneficial owners of shares of capital stock of The Susquehanna Corporation.

2. Demand upon Susquehanna's Board of Directors to bring this action against the individual defendants would have been futile. Tr. 342, 421, 623.

3. Intervening Plaintiff Gabriel Wolff, through his attorneys requested on January 10, 1966 that Susquehanna bring this cause against the individual defendants and said request was refused. Further, Susquehanna took no action to enforce such claims or otherwise comply with the request within the 60 day period provided for by § 16(b). Tr. 41, 42.

4. Korholz and Martha Korholz are husband and wife and Korholz by virtue of the share holdings of his wife and their three daughters controlled Gypsum, a New Mexico corporation. Korholz and his wife and children owned 56% of Gypsum's shares. Korholz at all relevant periods was Gypsum's president, a member of its Board of Directors and its executive committee.

5. Korholz dominated and controlled the Gypsum shares held by defendant Martha Korholz and his daughters and the shares held by each in Gypsum were voted by and under

the direction of Korholz and pledged as he directed. Tr. 65, 126-27, 871 PX 32. The loans made by the insurance companies to Gypsum were conditioned upon retention by defendant Korholz and his family of at least 1,000,000 Gypsum shares, a condition which could not be fulfilled unless both defendants' holdings were retained. Tr 366. Korholz and his family as a group held approximately 1,375,000 shares of Gypsum. DX 121.

6. Susquehanna at all pertinent times was and is a Delaware corporation. During the period from May through December, 1965, it had outstanding voting stock of approximately 2,488,000 shares of capital stock which were traded in the over-the-counter market. It had over 5,000 stockholders and $27,000,000 in assets. These capital shares were a class of equity security and Susquehanna's sole voting shares. PX 23.

7. On May 18, 1965, Korholz was elected a director of Susquehanna, a member of its executive committee and Chairman of its Board of Directors. Tr 249, 426, 514-15, PX 13, PX 39. By virtue of the purchase of that block of Susquehanna shares, on May 25, 1965, defendant Korholz was enabled to exercise control of Susquehanna and its Board of Directors. Tr 342, 421, 623, 632, 688.

8. By July 2, 1965, Susquehanna's capital stock became registered by virtue of a registration statement filed pursuant to the provisions of § 12(g) of the Securities Exchange Act of 1934, (15 U.S.C. § 78 l). PX 51

9. In March, 1965, Gypsum entered into separate indenture agreements with Massachusetts Mutual Life Insurance Company and State Mutual Life Assurance Company of America, under the terms of which those companies purchased Gypsum's promissory notes in the principal amounts of $3,500,000 and $2,500,000, respectively. Tr 348. These agreements impose certain restrictions on borrowing by Gypsum, Tr. 255, liens on Gypsum's assets, Tr 356, and Gypsum's investments in other corporations, Tr 360, DX 7, DX 8.

10. On or about May 1, 1965, Korholz learned that a block of Susquehanna shares representing control of that corporation was available for purchase from a number of persons known as the "Lannan group." Tr. 43, 170, 339, 440-41, 688, 862-63. This block ultimately aggregated some 485,000 shares and constituted in excess of 18% of Susquehanna's outstanding stock. The Lannan group conditioned any sale of this stock upon payment in cash. Tr 170, 195, 198, 338-342, 393-93, 396, 471, 644.

11. Korholz had learned there was dissension on the Susquehanna Board of Directors and that the Lannan group desired to sell. Tr. 173, 174, 370, DX 10, 11, 12.

12. Korholz determined to attempt the acquisition of the control block for Gypsum and so notified Gypsum's Board of Directors. Immediately thereafter he entered into negotiations in this respect with representatives of the Lannan group. Tr. 173-77, 193. At about the same time, Korholz advised William Brown, Vice-President of the First National Bank of Boston ("Bank"), of these negotiations and of Korholz's intention to seek to arrange for the financing by the Bank of 100% of the purchase price to be agreed on for the Susquehanna shares. Tr 174-78, 613, DX 12A, DX 19, DX 20, PX 23.

13. From the beginning Korholz presented the matter to Brown as a purchase of the Lannan shares, not by Korholz, but by Gypsum. DX 12A.

14. Brown, who had been instrumental in arranging Gypsum's $6,000,000.00 refinancing with Massachusetts Mutual and State Mutual, and was familiar with both Korholz and Susquehanna, indicated the willingness of the Bank to provide such financing for Gypsum but pointed out to Korholz the inability of Gypsum to incur the proposed indebtedness to the Bank or to acquire the Lannan block because of restrictions contained in the insurance companies' indenture agreements. The Bank would permit Gypsum to be the borrower only if Massachusetts Mutual and State Mutual first amended the indenture agreement so as to permit the

borrowing and thus assure the Bank of its first lien upon the Susquehanna shares so purchased and Gypsum's assets. Tr. 184, 185, 195, 349, 380, 623-29, 650-51, 652-53, 665-66.

15. Korholz and Brown thereafter met with representatives of Massachusetts Mutual and State Mutual. The representatives reacted favorably to the proposed purchase. Tr 183-86, 436, 650-53. Tentative agreement was given by the insurance companies to amend the insurance indentures upon the conditions that Gypsum would be required to agree to repay the Bank loan upon merger into Susquehanna, that Gypsum would be required to agree to reduce the Bank loan upon sale of its Albuquerque, New Mexico plant, and that Korholz and two other directors of Gypsum would be elected directors of Susquehanna and have the power to appoint two additional directors thereafter. Tr 184, 444-47, DX 16, DX 17, DX 14, DX 15. The first two conditions required Gypsum Board of Director approval and the third condition was not contained in the final amendments to the indenture agreements. Tr 461-62, DX 60, DX 61. Minutes of Gypsum's executive committee reflected a meeting which was purportedly held on June 21, 1965 (DX 68, Item 6) which approved the two remaining conditions and authorized Gypsum's purchase of Korholz' shares but was not held as the evidence shows and the defendants themselves admit. Tr 737, 743-44, 771, 777-78.

16. These lenders were asked to confirm their oral consents in telegrams. This they did on May 12 and 14. Tr 618, DX 15, 24, 25. Each insurance company lender considered its telegraphic consent as a writing satisfying the respective loan agreements with Gypsum. Tr 752, 965-66, DX 7, 8.

17. The Bank's lawyers advised that as a prerequisite to the $6,450,000 loan, written documents of consent should be drafted and signed. Tr 662, 667, 696, 723.

18. Korholz on May 11 went again to Chicago to meet with representatives of the Lannan group. They stressed that Gypsum must act quickly or another buyer offering the same price, or one of several merger offers, would be

accepted by the Lannan group. Tr 193, 198, 340, 345, 472-73.

19. The insurance companies' indentures not yet having been amended and being advised that the Bank could not make the loan to Gypsum, Korholz (as advised by Brown) determined to purchase the Susquehanna shares himself for Gypsum. Tr 210, 223-24, 386, 454-56, 477, 500, 532, 665, 668, 669-70, PX 5A (p. 3), PX 12, PX 18, PX 20 (p. 6), DX 60, DX 61.

20. Brown decided to use Korholz as an "intermediary" rather than wait for the formal consents. Before making the loan to Korholz, Brown insisted on documentation, namely, a proper Board of Directors resolution and a signed note, establishing that Gypsum would acquire the stock when the formal consents were executed. DX 19, 20, Tr 624, 639-40, 672, 693-94, 723.

21. Korholz then informed the representatives of the Lannan group that he would be the purchaser of the Susquehanna shares. Tr 474, 477. The Lannan group placed severe time pressure upon Korholz to complete any purchase of their Susquehanna shares. Tr 46, 52, 182, 193, 197, 198, 482. Other purchasers were supposedly available and Korholz was required by them to arrange for financing and close the transaction within days. Tr 34, 473, 477, 628, 665-66.

22. On May 12 a meeting of Gypsum's Board was held in Albuquerque, New Mexico to consider the Susquehanna stock purchase. DX 13, Tr 198-99, 209-216. At the Board meeting, Korholz brought the directors up to date on his negotiations with Brown and the insurance companies. He told them that the insurance company executives had given assurances that they would consent to the Gypsum loan to purchase the stock. Tr. 222-224. See also Tr. 449, 490-493, 502, 731, 761-763. Korholz testified that he had informed the directors at the Board meeting that "Mr. Brown had committed himself and the Bank to an advance of funds to American Gypsum Company, but provided that the amendments were satisfactory to the attorneys for the Bank. But

he had also committed himself that if that could not be done in time, he would advance the moneys to purchase the stock to me so that I could acquire it on behalf of Gypsum, provided that I would put up all, as collateral, my personal holdings of Gypsum, those of my wife Martha, and I think those of my children . . ." Tr. 224.

23. In anticipation of and in order to provide for the transfer to Gypsum of the Susquehanna shares to be purchased by him, on May 12, 1965, Gypsum's Board of Directors adopted a resolution (DX 13) which was the only written agreement between Gypsum and Korholz, Tr 54, the operative portions of which read as follows:

> "NOW, THEREFORE, BE IT RESOLVED: That if Herbert F. Korholz and Martha Korholz acquire 430,000 shares of Susquehanna at $15.00 per share and if consents are first had and received from the insurance companies to which this company is indebted under certain loan indentures permitting acquisition of said shares, the company will acquire from Herbert F. Korholz and Martha Korholz said approximately 430,000 shares of the common stock of The Susquehanna Corporation at $15.00 per share, together with reimbursement to Herbert F. Korholz and Martha Korholz of any costs and expenses (including any interest expense incurred by them) incident to said acquisition; provided that such consents are received within one month from the date of this resolution. If such consents are not received, the company shall be under no obligation to Herbert F. Korholz and Martha Korholz in connection with their acquisition of said shares. If Herbert F. Korholz and Martha Korholz do not acquire said shares, they shall be under no obligation to the company in connection thereunder.
>
> FURTHER RESOLVED: That the President and Secretary of this company are hereby authorized and directed to enter into an agreement with Herbert F. Korholz and Martha Korholz in form and substance necessary to carry out the intent of this Board as reflected in the foregoing resolutions."

24. In a unique act, all members of the Board signed this resolution even though it was in the body of the minutes and usually only the Chairman and Secretary signed Gypsum minutes.

25. No other understanding was ever entered into between Gypsum, Korholz and/or Martha Korholz. Tr 511. It was understood by Gypsum's directors that Korholz was to purchase the Susquehanna stock for the company and in the best interests of the company. Tr 783.

26. The Bank on or about May 12, 1965, requested and received a blank promissory note from Gypsum. Tr 476, PX 7, DX 19. The blank note signed by directors of Gypsum prior to May 17 and by Korholz on May 17 was filled in with a July 2 date and in the amount of $6,450,000.00 DX 19, 76, Tr 243-44, 627-644, 765 to replace Korholz' note in payment for the stock.

27. On May 12 the Executive Committee of Massachusetts Mutual formally determined to authorize officers of the company "to consent to modification of the Note Agreement . . ." DX 16, 17. The Massachusetts Mutual memorandum of May 12 states:

> American Gypsum has an opportunity to purchase between 400,000 and 430,000 shares of the common stock of Susquehanna Corporation at a cost of $6,000,000 to $6,450,000. . . .
>
> It is recommended that we allow the $6,450,000 bank loan to acquire the 15% stock interest in Susquehanna. The Susquehanna merger of American Gypsum into Susquehanna will result in a very strong company with substantial liquid assets and will provide a strong base for the highly regarded Mr. Korholz to make additional acquisitions. . . .

28. On May 12, 13 and 14, 1965, telegrams were sent by the insurance companies to which Gypsum was indebted to the Bank which are asserted by defendants to be the consents contemplated by the May 12 Gypsum resolution.

These telegrams contained conditions as heretofore described which were fulfilled or waived at a later date. Tr 458-62, 468-69, 663, 988-89, 1001-02, DX 23, DX 60, DX 61. Brown was positive that the formal consents would be forthcoming in a short time. Tr 693-694, 723. However, the Bank would not loan any monies to Gypsum based upon these telegrams. Tr 539, 623-24, 696.

29. Brown on May 12 also sent Korholz pledge agreements to be signed by Korholz and Mrs. Korholz and their daughter, explaining that these would be used when Gypsum picked up the stock if the loan was not made to Gypsum in the first instance. These were executed and delivered to Brown. DX 20, Tr 211-219, 686.

30. Because Gypsum was unable to obtain the necessary insurance company amendments to the indenture agreements to the indenture agreements in time to consummate the purchase transaction with the Lannan group, Korholz determined on the advice of Brown on May 14, 1965 to purchase the Susquehanna block for himself. Accordingly, he offered to purchase these Susquehanna shares by a tender offer. PX 13.

31. In order to carry out the tender offer, Korholz created an escrow at the Bank (accepted by it on May 17, 1965) whereby Susquehanna shares were deposited in the escrow by members of the "Lannan" group desiring to sell their shares and the Bank deposited $6,450,000 to Korholz's account in order to pay for the shares. Tr 237, 484-66, PX 12, DX 22. Ultimately, 430,000 Susquehanna shares were purchased and as required by his escrow agreement were held for Korholz's account by the Bank. Tr 335, PX 64, PX 12, PX 10, PX 62, PX 26, PX 54 (Item 2), DX 68.

32. The stock was placed in escrow by May 20 and paid for May 25. PX 10, DX 54. The stock went into escrow in street or blank form and came out that way. The stock was never in Korholz' name. It was held in blank form at the Bank until the loan was switched over to Gypsum, when it was registered in the name of Gypsum. The stock was never

transferred to the name of Korholz personally. Tr 267, 637, 727-28, 818; 819.

33. Brown was willing to use Korholz as an intermediary or straw, and to make the loan to him on an interim basis, because he relied on Korholz and on the telegraphic consents, In view of his long experience with the insurance companies. Tr. 628-629, 667, 668. Before proceeding with the loan to Korholz, Brown had in hand a blank note executed by officers of Gypsum and he also had a certified copy of the resolution of the Gypsum Board of Directors which established in his mind that Gypsum would take over the stock from Korholz and borrow the money from the Boston Bank, once the insurance company consents had been obtained. Tr. 629, 668-670, 745-765, 792, DX 19.

34. Korholz had conferred on and approved the first draft of the consents May 17 and they were forwarded to the insurance company lenders May 18. This draft is essentially identical, except for technical amendments, with the formal consents executed on June 9, DX 14, 15, 45, 60, 61.

35. On May 18 Korholz and two Gypsum Directors were elected Directors of Susquehanna, Korholz being named as Chairman and Chief Executive Officer of Susquehanna. Thus were fulfilled the first two conditions stated in the State Mutual telegram of May 14. DX 24, 39, Tr 248-252.

36. By May 18 Gypsum had agreed to or satisfied the stipulations in the insurance company telegrams of May 12 and May 14. DX 15, 24, 39, 45, 60 Tr 248.

37. In order to make the tender offer to the "Lannan" group effective, Korholz had executed a personal promissory 30-day note for $6,450,000 dated May 20, 1965 made payable to the Bank. Tr 52, 266, 516-17, 69, PX 5A. As security for his obligation, Korholz pledged 253,980 of his own Gypsum shares, 266,325 of Martha Korholz's Gypsum shares, his H. F. K. shares and the Susquehanna shares to be purchased by him. Tr 518-19, PX 5A (pp. 1, 3). Also, all of Korholz's daughters pledged their Gypsum shares. Tr 520. The note

was for only 30 days because everyone expected that in a very short time Gypsum would take over the loan. There was never any intent for Korholz to borrow the money and hold the stock on a long term basis. DX 48, PX 5A, Tr 260-61, 631-34.

38. Korholz signed that note in reliance upon the Board resolution of May 12, the Gypsum note signed in blank, the election to the Susquehanna Board of Korholz and the Gypsum directors, and the Bank's agreement to loan the money to Gypsum to pay for the stock. Tr 256-58, 327-330, 454, PX 30A, DX 12, 15, 39, 45, 60, 61.

39. The Bank was looking not just to Korholz but to the full corporate assets of both Susquehanna and Gypsum as security. The loan to purchase the stock had as security stock representing control of both Susquehanna and Gypsum as well as all of Korholz' stock. Tr 623, 629, 632, 687, 688, PX 7, DX 35.

40. On June 7 both insurance company lenders had agreed to the final text of the formal consents. DX 58, 59, 60, 61, Tr 754-55, 967, 1005-07. Korholz signed the previously agreed upon drafts of the formal consents on June 9. DX 60, 61, Tr 269-271. The insurance companies both signed the previously agreed upon consents June 14 but did so expressly "as of" June 9. Both insurance companies considered the consents binding as of June 9, their agreed upon date. DX 45, 57, 60, 61, 62, 63A, 65, Tr 755-758, 968-970, 990. In any event, Gypsum had no reason to insist on strict compliance with the provision in the resolution requiring the obtaining of consents within one month. Tr 225. Gypsum must be deemed to have waived any asserted delay in obtaining consents from the insurance companies. Tr 223-25, 694, 748, 763-64, 773.

41. As agreed to in the tender offer (PX 13), on or about June 23, 1965 (but relating back to his purchase of the Susquehanna shares in May, 1965), Korholz executed an investment letter in which he warranted to the "Lannan" group that he was acquiring the Susquehanna shares personally

and this personal acquisition was the basis of the transaction, Korholz reserving to himself the right to transfer such shares to Gypsum at cost or another corporation of which he owned more than 50% of the outstanding shares. Tr 525-27, PX 18 (p. 1), PX 18D, PX 18C, DX 35.

42. When Korholz signed this investment letter on June 25 the consents including those of June 9 rendered it beyond question that Korholz would not keep the 430,000 shares himself as on June 25 only the formality of Gypsum's payment remained. DX 37 Tr 240-42, 527-29.

43. On or about June 24, 1965 Defendant Korholz signed a Form 3 indicating that he was beneficial owner of 430,000 shares of Susquehanna common stock. In all probability the Form thus signed by Defendant Korholz was filed with the SEC on or about June 30, 1965. PX 24A, 24B, 24C, 52, Tr 277-79. In signing the said Form 3 for the purpose of filing with the SEC, Korholz had no intention of representing or admitting that he had acquired the 430,000 shares of Susquehanna stock, other than as an agent or nominee or intermediary acting on behalf of Gypsum. At the time Defendant Korholz signed the said Form 3, on or about June 24, 1965, he knew that he had acquired the 430,000 shares of Susquehanna stock on behalf of Gypsum, for a temporary period, and he knew that the formalities of placing the record ownership of such stock in Gypsum were scheduled to be completed within a few days. DX 65B. Defendant Korholz did not know, that under the SEC regulations a disclaimer could be attached to the said Form 3, in order to state facts indicating that Section 16(b) was not applicable to the transaction. Tr 331, PX 24.

44. One of the members of the Lannan group to whom the May 13, 1965, offer was made was out of the United States and arrangements could not be made for this individual, Wheelock Whitney, to deposit his Susquehanna shares with the Bank within the time period contemplated by Korholz's offer. Tr 254, 877. Therefore, Korholz offered on May 18, 1965, to purchase Mr. Whitney's 25,000 shares,

the offer to remain standing until August 21, 1965, when it could be accepted. Tr 255, 877, PX 17A.

45. Korholz's offer was accepted by Mr. Whitney and in August, Tr 255, 877, PX 17B, Korholz together with an associate, Samuel Ferguson, purchased 25,000 Susquehanna shares at $15.00 per share for a total of $375,000. PX 17C, PX 17D.

46. Although Wheelock Whitney's 25,000 Susquehanna shares were part of the original transaction between the Lannan group and defendant Korholz none of these shares were conveyed to Gypsum; PX 26B, 12,500 shares were retained by defendant Korholz and 12,500 shares were retained by Samuel Ferguson. Tr 879.

47. The Bank loaned $375,000 to defendant Korholz and Mr. Ferguson in connection with the Whitney shares, said loan representing the full amount of the purchase prices. DX 93, PX 17D, PX 63A.

48. On July 2, 1965, Korholz sold 430,000 shares of Susquehanna capital stock to Gypsum for the sum of $6,499,028.96, being equivalent to $15.114 per share. Tr 711-12, 716, 719, 797, PX 25D, PX 32, PX 54, PX 65A, PX 67A, PX 67B, PX 67C, PX 67D, PX 72, DX 68, DX 65B. That sum was based upon the initial purchase price paid by Korholz, escrow fees, transfer taxes and interest due on the Bank loan to Korholz until July 2, 1965. PX 32, PX 66, DX 68.

49. On July 2, 1965, Gypsum borrowed $6,450,000 from the Bank the proceeds of which were used to acquire the Susquehanna shares from Korholz. PX 22B (Item 8), DX 68.

50. Payment was made by Gypsum to Korholz for the Susquehanna shares by substituting the Gypsum promissory note to the Bank for Korholz's promissory note. The Bank thereafter discharged Korholz from his obligation on July 6, 1965 after payment to the Bank by Gypsum of $49,028.96, PX 5A (p. 2), PX 32, DX 48, 79, Tr 702-09.

51. Just as a technicality, the Bank set July 2 as the payment date, or date for the switchover of the Korholz and Gypsum notes and so advised the Treasurer of Gypsum. PX 32, DX 65A, Tr 273-74. The Treasurer of Gypsum, was not a Director of the Corporation and had no authority to enter into an agreement on behalf of Gypsum to buy the 430,000 shares of Susquehanna stock from Korholz on July 2. DX 65A, Tr 273-74, 773.

52. There was no agreement between Gypsum and Korholz about a purchase and sale by Korholz to Gypsum on July 2, Korholz did not authorize anyone to represent him at a "closing" on July 2 and did not know that any closing took place on July 2. Tr 286-289, 293.

53. Mrs. Korholz did not participate in these transactions other than by signing a pledge of her stock as security for the Korholz note of May 20 and the Gypsum note of July 2, Tr 64, 126-27, DX 79.

54. Early in August, 1965, a Form 4 for July, 1965, listing changes in ownership during the month of July, was filed on behalf of Defendant Herbert F. Korholz. The said Form 4 was not signed by Defendant Korholz and he had no knowledge concerning preparation or execution of the said Form 4. The said Form 4 was signed for Defendant Korholz by J. Carney, his secretary. PX 25D, Tr 277-280, 901-03, 884-85. There is no evidence that Mrs. Carney, secretary to Mr. Korholz, knew in 1965 that under the SEC regulations a disclaimer could be attached to the said Form 4, in order to state further facts indicating that Section 16(b) was not applicable to the transaction. Tr 874, PX 25D.

55. On August 10, Gypsum filed with the SEC Form 8K, which stated:

> On July 2, 1965, the registrant purchased from H. F. Korholz and Martha Korholz, his wife, 430,000 shares of common stock of the Susquehanna Corporation for a total consideration of $6,499,028.96...

> The purchase by the registrant for the foregoing consideration had, prior to the acquisition of such stock by Mr. & Mrs. Korholz, been approved by the Board of Directors of the registrant, provided that Massachusetts Mutual Life Insurance Company and State Mutual Life Assurance Company would consent to such purchase. Each of the foregoing companies gave its consent on June 9, 1965. . . . PX 54.

In September, 1965 Susquehanna filed with the SEC its Form 8K indicating that as of June 30, 1965 H. F. Korholz "beneficially owned" 430,000 shares of Susquehanna stock. These said Form 8Ks were filed, not pursuant to Section 16 of the Securities Exchange Act of 1934, but pursuant to another provision of that statute.

56. On October 19, 1965, Gypsum and Susquehanna by action of its respective Board of Directors entered into an agreement whereby Gypsum would be merged into Susquehanna. Tr 842, PX 23.

57. At the meetings of the stockholders of Susquehanna and Gypsum held, respectively, on December 7 and December 10, 1965, the merger was approved. Tr 846-48, 851-52, 862, PX 23, PX 30M, PX 22D, DX 99A.

58. The "effective date" of the merger was December 13, 1965, Tr 843, PX 300, and by virtue of the terms of the merger agreement the Korholz defendants on that date acquired the following number of Susquehanna shares, Tr 116, PX 27C, PX 27, PX 27B, PX 88 (p. 43), PX 23 (p. 40), PX 27A:

Herbert F. Korholz	386,102
Martha Korholz	140,171

59. On December 13 Susquehanna and Gypsum were merged on the basis of one Susquehanna share for each 1.9 shares of Gypsum. DX 99, 115, 116.

60. On the 13th of December Susquehanna shares were selling for $13 to $13 3/8 on the over-the-counter market. Tr 554, 933, 957. The Susquehanna Board of Directors on December 17 adopted a resolution fixing $13.13 as the price

of each Susquehanna share in determining cash payment in lieu of fractional shares. PX 300.

61. As of December 13, Gypsum shares were selling for an average price of $6.875 on the over-the-counter market. Tr 554-59, 930-35, 957.

62. Shortly prior to December 13, Korholz was offered by an investment company $8 a share for all the Gypsum stock he owned. Tr 560, 564-65. At $8 per share, 1.9 shares of Gypsum stock would be worth $15.20.

63. The Korholz owned 56.7% of Gypsum's shares, and thus Korholz stock was control stock. DX 121. Since the Korholz family owned more than 50% of the Gypsum stock, Defendant Korholz had absolute control and such control commands a higher premium than a minority block of stock, which ordinarily would represent effective control. Tr 576-577.

64. On December 13 control shares of Gypsum, such as Mr. Korholz had, were reasonably valued at a premium of 20% over the fair market value of similar shares of Gypsum. Tr 564-65, 905-06. At a premium of 20% over the fair market value of $6.875, a control share was reasonably valued at $8.25. Tr 556. Since the merger involved an exchange of 1.9 shares of Gypsum for each share of Susquehanna, the consideration given up by Mr. Korholz when he exchanged his Gypsum stock was reasonably valued at $15.68 per share of Gypsum stock. Tr 557. He. The fair market value of 1.9 Gypsum control shares on December 13 was approximately $15.68.

65. The stock Korholz exchanged for Susquehanna in the merger was worth at least $15.11 per share on December 13, 1968.

66. From May 12 on, it was the intention of all persons involved in this transaction to acquire the Lannan group's 430,000 shares of Susquehanna for Gypsum. Korholz found an opportunity that would benefit his corporation, Gypsum and its shareholders, he presented the opportunity to his

corporation, and he aided Gypsum to acquire the opportunity by lending his personal credit, i.e., by delivering his personal note for $6,450,000, with his stockholdings as collateral. Korholz from the beginning presented the matter as an excellent opportunity for corporate growth by Gypsum. Tr 223, 613, 730-31, 760-61, 773, DX 12A. Korholz understood that he had acquired the Susquehanna stock "on behalf of Gypsum." Tr. 224. He never intended to own the Susquehanna stock, except as a stop-gap measure until Gypsum obtained the insurance company consents that the Bank insisted upon. Tr. 260. Korholz felt that this was Gypsum stock. Tr. 416. Korholz understood that the resolution of May 12 meant that he would hold the Susquehanna stock on behalf of Gypsum until the attorneys for the insurance companies prepared the consents. Tr. 50. It is clear from all the evidence that from conception until consummation all connected with this transaction had only one purpose, that is to acquire 430,000 Susquehanna shares for Gypsum as a prelude to the merger of Susquehanna and Gypsum. DX 12A, 13, 15; 17, Tr 343, 486, 975-76. There is no evidence that Korholz intended to purchase and own these 430,000 shares personally, nor did any person connected with this transaction ever intend that Korholz personally purchase or own these shares.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the subject matter of this cause by virtue of § 27, Securities Exchange Act of 1934, and the parties hereto.

2. The plaintiff and Intervening Plaintiff having asserted claims based upon § 16, Securities Exchange Act of 1934, have fulfilled all prerequisites required thereby and by law for the bringing of such actions or have proven the futility thereof or legal excuse therefor.

3. This action is not collusive to confer jurisdiction upon this Court.

4. On July 2, 1965 and thereafter for all times relevant hereto, shares of capital stock of Susquehanna were registered pursuant to § 12g, Securities Exchange Act of 1934, its sole, non-exempt, equity security.

5. For purposes of application of the Securities Exchange Act of 1934, Korholz is the beneficial owner of the shares held by Martha Korholz in Gypsum and Susquehanna and in the Mary Lou Korholz custodian account.

6. The purchase of 430,000 shares of Susquehanna stock in May, 1965, was accomplished by Herbert F. Korholz for Gypsum and on behalf of Gypsum.

7. There was no sale of the 430,000 shares of Susquehanna stock on July 2 between Korholz and Gypsum within the meaning of Section 16(b) of the Securities Exchange Act of 1934.

8. Plaintiffs have not sustained their burden of proving that Korholz sold 430,000 shares of Susquehanna stock on July 2 within the meaning of Section 16(b) of the Securities Exchange Act of 1934.

9. July 2 was merely a payment date for the stock acquired pursuant to the May 12 resolution of Gypsum.

10. While the defendants did not contest that the merger of Susquehanna and Gypsum on December 13 amounted to a "purchase" by the Korholz defendants of in excess of 442,000 shares of Susquehanna stock within the meaning of Section 16(b) of the Securities Exchange Act of 1934 in light of *Securities and Exchange Commission v. National Securities, Inc.*, 393 U.S. 453 (1969), we do not find it necessary to so hold since we have found that there was no Section 16(b) sale and moreover when the various transactions are viewed as a whole there was no "sale" and "purchase" within six months within the meaning of the Section.

11. In their Complaint, Plaintiffs pleaded that in August 1965 Defendant Korholz had made a purchase from Wheelock Whitney of 12,500 shares of Susquehanna stock. No attempt was made to amend the pleadings in this respect, and Plain-

tiffs maintained the foregoing theory until the close of the trial herein. At the end of the trial Plaintiffs set forth a new theory in respect to this transaction, namely, that in August 1965 Korholz had acquired 25,000 shares of Susquehanna stock from Whitney and immediately thereafter had made a "sale" to Samuel Ferguson of 12,500 shares. Defendants were taken by surprise and had no reasonable opportunity to defend against this new theory. Even had such a purchase and sale occurred there was no profit to the Korholz defendants involved in these transactions.

12. No liability under Section 16(b) arises from the purchase by Korholz of 12,500 Susquehanna shares from Whitney in August 1965, because he did not make a "sale" of Susquehanna stock within a period of less than six months prior to or subsequent to such purchase.

13. Mrs. Korholz made no Section 16(b) "sale" of Susquehanna stock and no liability can attach to her under Section 16(b).

14. None of the transactions, as aforesaid, occasioned "profit realized" within the meaning of Section 16(b) to Herbert F. Korholz or to Martha Korholz.

15. These transactions, while they could be construed as falling within the literal provisions of the Act when given its broadest interpretation, will not be so characterized in light of the factual situation as developed in this case when set against the corrective purposes and rationale of Section 16(b). Not only was there no possibility of insider abuse occurring on short swing trading in this case, there was none.

ENTER: /s/ Alexander J. Napoli

UNITED STATES DISTRICT JUDGE

DATED: June 10th, 1969